SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD, AND HUGH MILLARD, PETITIONERS,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF UNITED CIGAR STORES COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in United States circuit court of appeals, second circuit	1	1
Statement of case	1	1
Record from district court of the United States, Southern New York	3	2
Proof of claim	3	2
Exhibit A—Lease, June 14, 1920, claimants to bankrupt	7	5
Notice of motion by claimants	20	15
Petition of claimants	21	16
Order to show cause	23	17
Petition of Irving Trust Company	24	18
Amended proof of claim	26	19
Stipulation as to claims	31	22
Decision of referee in bankruptcy	32	23
Order expunging claim	41	29
Petition for review	43	30
Certificate of referee	45	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1933

	Original	Print
Order appealed from	47	33
Memorandum endorsed on order	48	33
Petition for appeal	48	34
Order allowing appeal	50	34
Assignment of errors	50	35
Recital as to stipulation waiving bond	52	35
Recital as to citation	52	35
Stipulation as to record	52	36
Clerk's certificate (omitted in printing)	53	
Opinion, Hand, J.	54	37
Judgment	56	39
Clerk's certificate	57	57
Order allowing certiorari	58	41

[fols. a & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt; Samuel R. Brown, Almira B. Millard, Alfred Millard, and Hugh Millard, Petitioners-Appellants; Irving Trust Company, as Trustee in Bankruptcy, Appellee

STATEMENT OF CASE

This proceeding was commenced in the United States District Court for the Southern District of New York on August 29, 1932, by the filing of a voluntary petition for adjudication in bankruptcy by United Cigar Stores Company of America, a New Jersey corporation. On the same day said corporation was adjudicated a bankrupt, and Irving Trust Company was appointed Receiver in Bankruptcy. On September 10, 1932, said Irving Trust Company was [fol. 2] elected Trustee in Bankruptcy. The Referee to whom this matter was referred is the Honorable Irwin Kurtz.

On January 13, 1933, a proof of claim was filed on behalf of the above-named petitioners-appellants and an amended proof of claim was filed by said petitioners on April 5, 1933.

On February 28, 1933, petitioners filed and served their petition and notice of motion to liquidate said claim. On March 8, 1933, the Trustee filed and served its petition to expunge said claim, together with an order to show cause. Said applications came on to be heard before the Referee on March 13, 1933, and on the 26th day of April, 1933, an order of the Referee was made and entered, denying petitioners' petition to liquidate said claim and the same was disallowed, rejected and expunged and it was ordered that no dividend be paid thereon. On April 29, 1933, the petitioners filed a petition for review and, pursuant thereto, the Referee, on May 1, 1933, transmitted his certificate to the United States District Court. The same came on to be heard on May 3, 1933, and by order made and entered May 3, 1933, the order of the Referee was affirmed and the petition to review denied and dismissed.

No parties have been arrested and no property attached. The bankrupt estate is in possession of the trustee in bankruptcy.

Final decree affirming the Referee's order, denying the petition to review and dismissing the same was entered on May 3, 1933. This appeal was taken on May 5, 1933.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55,129

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

PROOF OF CLAIM

UNITED STATES OF AMERICA,
State of Nebraska,
District of Nebraska, ss:

At Omaha in the District of Nebraska, on the 10th day of January, 1932, came Winthrop B. Lane of Omaha, in the County of Douglas and State of Nebraska, attorney for Samuel R. Brown of Los Angeles, County of Los Angeles, State of California, Almira B. Millard of Los Angeles, County of Los Angeles, State of California, Alfred Millard of Los Angeles, County of Los Angeles, State of California, and Hugh Millard of the City of Madrid, Republic of Spain, and made oath and says that United Cigar Stores Company of America, a New Jersey corporation, who is the person by whom a petition for adjudication of bankruptcy has been filed and who has been duly adjudicated a bankrupt, is justly and truly indebted to the said Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, in the sum of ($143,615.80). That the consideration of said debt is as follows:

Samuel R. Brown is the successor by devolution of the 6/12th interest of Samuel A. R. Brown in the south ¾ of [fol. 4] Lot 8, Block 119, and the east ⅓ of Lot 7, Block 119, being 88 feet on Farnam Street and 99 feet on 14th Street, situated at the northwest corner of Farnam and 14th Streets, and being known as and by the street numbers 1402-4-6-8 Farnam Street and 218 14th Street in the

City of Omaha, County of Douglas, State of Nebraska, together with all buildings and improvements thereon and appurtenances thereto.

Almira B. Millard is the owner of a 4/12th interest in said property.

Alfred Millard is the owner of a 1/12th interest in said property.

Hugh Millard is the owner of a 1/12th interest in said property.

On June 14th, 1920, Almira Millard owned a 6/12th interest in said property of which she thereafter conveyed a 1/12th interest each to Alfred Millard and Hugh Millard.

On June 14, 1920, Samuel A. R. Brown owned a 6/12th interest in said property, to which Samuel R. Brown has succeeded as aforesaid.

On June 14th, 1920, Samuel A. R. Brown and Almira Millard, by an indenture of that date, demised said property to the above bankrupt, its successors and assigns, for the term commencing July 1, 1920, and expiring June 30, 1945, at a rent which for the period from July 1, 1924, to June 30, 1945, was to be $20,000 annually, payable in equal monthly payments in advance on the first day of each and every month during the term. Said indenture of lease also provided as follows:

"Provided also, and these presents are upon this covenant, that if the Lessee (meaning the above bankrupt) do [fol. 5] or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding

breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

On August 29, 1932, the above bankrupt was adjudicated a bankrupt by the United States District Court for the Southern District of New York.

On September 10, 1932, Irving Trust Company, a corporation organized and existing under the laws of the State [fol. 6] of New York, was duly elected Trustee in Bankruptcy of the above bankrupt.

On November 23, 1932, the said Trustee rejected the Indenture of Lease of said property.

Thereafter and on November 26, 1932, claimants, after due notice to the said Trustee and to the above bankrupt, duly entered upon the said property and the lease thereupon determined.

The loss of rent incurred by the tenants by reason of such termination during the residue of the term above specified is $140,615.80. The arrears of rent unpaid at the time of said rejection by the said Trustee was $3,000. Said losses are determined as follows: The rent stipulated in the lease was $20,000 per annum after the payment of all taxes and charges. The property has a rental value for the remainder of the term of $5,000 annually in taxes and charges. The loss to claimants is therefore $15,000 annually from November 26, 1932, until June 30, 1945. The present value of said sum, discounted at 5% annually, is $140,615.80. The arrears of rent at the time of said re-entry was $3,000, but said sum is liable to be diminished if claimants are able to collect from users and occupiers of the said premises from September 1, 1932, to November 26, 1932, or from the said Trustee or otherwise, any sums as rent.

That no part of said debt has been paid except (whatever rent has been collected) and that this deponent has not nor has any person by his order or to this deponent's knowledge or belief, for claimant's use, had or received any manner of security for said debt whatever, and this de- [fol. 7] ponent further says that this deposition cannot be made by the claimants in person because the claimants are

located in distant cities and are unfamiliar with the facts except as informed by deponent, and that he is duly authorized by his principals to make this affidavit and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt to the best of his knowledge and belief still remains unpaid and unsatisfied.

Samuel R. Brown, Almira B. Millard, Alfred Millard, Hugh Millard, by Winthrow B. Lane, Their Attorney.

Subscribed and sworn to before me this 10th day of January, 1933. Paul L. Martin, Notary Public. (Seal.)

EXHIBIT A TO PROOF OF CLAIM

By this indenture, executed this 14th day of June, 1920, in consideration of the rent and covenants herein reserved and contained, entered into by the parties hereto for themselves, their respective heirs, administrators, successors, legal representatives and assigns, Samuel A. R. Brown residing at Omaha, Nebraska, and Almira B. Millard residing at Omaha, Nebraska, hereinafter jointly, severally and collectively called the Lessor, City of Omaha, State of Ne-
[fol. 8] braska, doth lease and demise unto United Cigar Stores Company of America, incorporation under the laws of the State of New Jersey having an office at No. 44 West 18th Street, City of New York, hereinafter called the Lessee, South ¾ of Lot 8, Block 119 and the East ⅓ of Lot 7, Block 119, together with all buildings and improvements thereon erected being eighty-eight (88) feet on Farnam Street and ninety-nine (99) feet on Fourteenth Street, situated at the Northwest corner of Farnam and Fourteenth Streets, and being known as and by the street numbers 1402-4-6 and 8 Farnam Street and 218-20 Fourteenth Street, in the City of Omaha, County of Douglas, State of Nebraska, with the appurtenances, to be used as a cigar store, and for the sale of such sundry merchandise as is or may be dealt in generally by Lessee.

To have and to hold the premises hereby demised unto the Lessee, its successors and assigns for the term commencing July 1st, 1920, and expiring June 30th, 1945.

Yielding and paying therefor the yearly rent of Eighteen thousand ($18,000) Dollars from July 1st, 1920, to June 30th, 1922, the yearly rent of Nineteen thousand ($19,000) Dollars from July 1st, 1922, to June 30th, 1924, and the yearly rent of Twenty thousand ($20,000) Dollars from July 1st, 1924, to June 30th, 1945, payable in equal monthly payments in advance on the first day of each and every month during the term.

And the Lessee does hereby covenant with the Lessor, that the Lessee, during the said term will pay to the Lessor, the said rent at the times and in the manner aforesaid and [fol. 9] will keep the said premises in as good order and repair as when delivered to it, damage by fire or other casualty or happening excepted; and will keep good with glass of the same kind and quality as that which may be injured or broken, all the glass now or hereafter in the premises, unless the same shall be broken by fire, but provided that in the event that any of said glass shall be broken or damaged by any cause before the commencement of the term herein demised, the same shall be replaced at the expense of the Lessor, and at the expiration of the term the Lessee will remove its goods and effects, and will peaceably yield up to the Lessor, the said premises, in as good order and repair as when delivered to it, damage by fire, casualty or act on the part of any governmental authority, ordinary wear and tear and damage by the elements excepted.

That the Lessee will not assign this lease without the written consent of the lessor but may sublet the demised premises or any part thereof for any lawful business which shall not be extra hazardous on account of fire.

That during the term the Lessee will not consent that said premises be overloaded or damaged, or that any trade or occupation shall be carried on upon the said premises or any use made thereof which shall be unlawful or contrary to any law of the State or ordinance or by-law of the City for the time being in force; that no act or thing shall be persisted in upon the said premises which will make void or voidable any insurance on the said premises or building against fire, and the Lessee shall have the right to make alterations, changes and improvements to and remodel the premises, inside and outside, at its own expense, provided that the work thereof shall be done in conformity with the building laws of the City, County and State; that no addi-

[fol. 10] tion or alteration to or upon the said premises shall be made which will endanger the safety of the building, and the Lessor covenants and agrees upon demand at any time after the execution of this lease to properly execute or cause to be properly executed, and deliver to the Lessee all applications, consents and other instruments, which may be necessary or required by any and all public or quasi-public authorities, permitting and authorizing such alterations, changes, improvements and remodeling.

That the Lessor may during the term at reasonable times enter to view the premises and may show the said premises and building to others, and at any time within three months next before expiration of the said term may affix to any suitable part of the said premises a notice for letting or selling the premises, or building, and keep the same affixed without hindrance or molestation.

Provided also, and these presents are upon this covenant, that if the Lessee [meaning the above bankrupt] do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under [fol. 11] and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified.

All notices required or agreed to be given hereunder by either party shall be in writing and given by personal delivery to the Lessor or to one of the executive officers of the

Lessee or shall be sent by registered mail addressed to the party intended to be notified at its last known post office address and notice given as aforesaid shall be a sufficient service thereof.

Rider

The lessee further covenants and agrees to pay in addition to the rent hereinabove reserved, all real estate taxes and water charges assessed against the demised premises within thirty days after the same shall become due and payable but nothing herein contained shall be deemed to require the lessee to pay any income, rent, inheritance and/or other taxes except such as are assessed or imposed against the real estate.

The lessee shall have the right to contest or review by legal proceedings or in such other manner as it deems suitable, which proceedings, if instituted, shall be conducted promptly at its own expense and free of expense to the lessors (but lessors covenant and agree to join in such applications, if required by law, requirements, regulations or authorities wherein premises are located), any taxes or [fol. 12] water rates imposed upon or against the parcel of land or buildings or improvements thereon above described, and in case any such taxes or water rates shall, as a result of any such proceedings or otherwise be reduced, cancelled, set aside or to any extent discharged and upon the determination of such proceedings, the lessee shall pay the amount that shall be finally assessed, or imposed against said premises or be adjudicated to be due and payable on any such disputed or contested items. The legal proceedings herein referred to shall include appropriate appeals from any judgments, decrees or orders and certiorari proceedings and appeals from orders therein, but all such legal proceedings shall be begun as reasonably soon as possible after the imposition of any contested lien and shall be prosecuted to final adjudication with all promptness and despatch.

The lessee covenants and agrees that the lessee will at its own cost and expense at all times, keep the building or improvements now or hereafter erected on the land forming part of the demised premises or in the course of construction thereon, insured in the name of the lessors and lessee, as their respective interests shall appear, against

loss or damage by fire in an amount equal to the full insurable value thereof, as the same shall from time to time be determined by the Fire Insurance Exchange, Board of Fire Underwriters or any organization performing the functions usually performed by such exchange (eighty per cent clause, if procurable) in standard line fire insurance companies authorized to do business in the State of Nebraska and will deliver the policies of such insurance or certificates thereof to the lessors, and should the lessee be unable to or shall fail to secure and place such insurance for said amount, the lessors may secure and place the same, [fol. 13] in which event, the lessee shall and agrees to pay to the lessors, on demand, the amount of the premiums paid therefor.

In case the building forming part of the demised premises or any building hereafter erected upon the land forming part of the demised premises, shall be so damaged by fire or other casualty or happening during the first twenty (20) years of the term, as to substantially destroy the same, the said building shall be rebuilt as speedily as possible by and at the expense of the lessors, and the rent and taxes hereinbefore reserved shall be suspended or abated until the said building or buildings shall have been so restored and rebuilt, and put in proper condition for use and occupation, and any unearned rent and taxes paid in advance of such destruction by the lessee, shall be refunded to it, but in the event that the said building or buildings now or hereafter erected upon the land, shall be totally or substantially destroyed by fire at any time after the first twenty (20) years of the term, then the lessee shall have the option of either requiring the lessors to rebuild the same at the expense of the lessors, or of terminating this lease, in which latter event this lease shall terminate as of the date of the total or substantial destruction of the building or buildings by fire or other casualty or happening, and any unearned rent and taxes paid in advance by the lessee shall be refunded to it, and in the event of the lessee requiring the lessors to rebuild, then the lessors shall rebuild as speedily as possible, and the rent and taxes hereinbefore reserved, shall be suspended and abated, until the said building shall have been so restored and rebuilt and put in proper condition for use and occupation, but in case of such damage or destruc-

tion during the term of this lease as shall not substantially [fol. 14] destroy the building or buildings now erected or hereafter erected upon the land, then the demised premises shall be restored to their condition immediately prior to such damage or destruction with due diligence by the lessors and a just proportion of the rent hereinbefore reserved according to the extent of the injury or damage sustained by the demised premises, shall be suspended and abated until the demised premises shall have been so restored and put in safe and proper condition for use and occupation.

The lessors covenant and agree that the demised premises will be delivered to the lessee upon the commencement of the terms of this lease in as good condition as the same now are, free from all orders and notices of violation of all public and quasi-public authorities and free from complaints and/or reports of violations noted or existing in and filed with any Federal, State, County, Municipal and/or Borough authorities and subject, however, to the following leases, tenancies and occupancies:

Tenant	Space occupied	Term expiration	Annual rental	Deposit
Geo. J. Kozeros & John G. Kozeros	Basement and ground floor store, 218 S. 14th Street	Feb. 28th, 1927	$1200. to Feb. 28, 1922, $1500. from Mar. 1, 1922 to Feb. 28, 1927	None
A. P. Sanderson, Geo. Kozeros, Angelos Calozumes & John Terfis	Second floor, 218 S. 14 St., Third floor, 218 & 220 S. 14th St.	Apr. 30th, 1925	$1200.	None
Dr. Clara B. Cross	2 rooms, 2nd floor, N. W. Cor. 14th & Farnam St.	Mar. 31st, 1922	$240.	None
C. A. Sherwood	2nd floor, 220 S. 14th Street	June 30th, 1922	$300.	None
Jabez Cross	220 S. 14th Street	Apr. 14th, 1927	$1200. to Apr. 14, 1922, $1640. from Apr. 15, 1922 to Apr. 14, 1927	None
Sachs Cigar Co.	Basement and ground floor, 1406 Farnam	Feb. 28th, 1922	$3000.	None

[fol. 15]

Tenant	Space occupied	Term expiration	Annual rental	Deposit
John W. Welch	Building, 1406 Farnam St.	Apr. 30th, 1930	$4800. to Apr. 30, 1924, $7200. from May 1, 1924 to Apr. 30, 1930	None
Williams & Smith Co. & Edgar B. Williams	Storeroom and basement, N.W. Cor. Farnam & 14th Sts., and loft on 3rd floor 1406 Farnam St.	Mar. 31st, 1925	$7440.	None
J. H. Sutley	5 rooms, 3rd floor, N. W. Cor. 14th & Farnam	July 31st, 1921	$360.	None
National Security Fire Ins. Co. of Neb.	6 rooms, East side, 2nd floor, N.W. Cor. 14th St. and Farnam St.	July 31st, 1925	$420. to July 31, 1920, $600 from Aug. 1, 1920 to July 31, 1925	None
H. G. Bair	1 room, 2nd floor, N. W. Cor. 14th and Farnam Sts.	Apr. 30, 1925	$180.	None
Hayes	2 rooms, 3rd floor to left of stairway facing 14th St.	Monthly tenancy	$120.	None
Hallenborg	2 rooms, second floor to right of stairway facing Farnam St.	Monthly tenancy	$300.	None

and the said lessors do covenant, warrant, represent and agree that the said leases, which leases have been submitted to the lessee and have been initialed by it for identification, are all of the leases and agreements affecting the said premises, and that the same have not been modified, amended or extended, and the lessors covenant not to modify, amend or extend the same prior to the commencement of the term of this lease, and the said leases are hereby assigned, transferred and set over to the lessee herein as of the date of the commencement of the term hereunder and during all the rest, residue and remainder yet to come of the term mentioned in said respective leases.

The lessors covenant and agree that no rents have been paid under any of said leases beyond the commencement of [fol. 16] the terms of this lease, and no deposits have been made by any of the tenants. The lessee agrees to indemnify and hold harmless, the lessors of and from any and all claims and demands which may be made against the lessors by the said tenants for any breach by the lessors herein of the covenants to be performed by the lessors under said leases during the term of this lease.

The lessee covenants and agrees that the lessors shall not be liable for any damages to property or personal injuries caused to any person or persons during the term of this lease by reason of any defects now existing in said premises or hereafter occurring in or in front of the said premises, and it is further agreed that all personal property placed in the said premises during the term of this lease shall be so placed at the risk of the lessee only, and that the lessors or their agents shall not be liable for any damage either to person or property sustained by the lessee or other persons due to the building forming part of the demised premises or any part or appurtenances thereof, becoming out of repair or arising from bursting or leakage of water, gas, sewer, or steam pipes, or from any act of neglect of employees, co-tenants or other occupants of said building or any other person or due to the happening of any accident from whatsoever cause in and about said building.

It is expressly understood and agreed that the lessee, its successors and assigns shall have the right to demolish and/or remove any and/or all of the buildings which are now erected on the land forming part of the demised premises, or any building or buildings hereafter erected in

lieu thereof, for the purpose of erecting upon the said premises a new building or buildings, without accounting for the building or buildings so removed (all salvage to be and become the property of lessee) and the lessors covenant [fol. 17] and agree upon demand at any time after the execution of this lease, to properly execute or cause to be properly executed and deliver to the lessee all applications, consents and other instruments which may be necessary or required by any and all public or quasi-public authorities, permitting and authorizing the erection of such new building or buildings, upon the following terms and conditions:

1. The lessee shall, after demolishing such building or buildings, with reasonable diligence, cause to be erected at its own cost and expense, upon the land forming part of the demised premises, a new building or buildings of such size, dimensions and content as lessees may desire, constructed of brick, iron, concrete and/or stone, or any or all of them or other similar materials, and to be what is known generally as "fire-proof" and of modern and up-to-date construction, and to cost not less than One Hundred Thousand Dollars ($100,000.00), and that the said building or buildings, if as and when erected shall upon the expiration of the lease, become the property of the lessors; said building, if erected, shall be at least two (2) stories in height and suitable for use for stores and/or offices.

2. That lessee shall obtain all necessary and proper permits and authorizations therefor from all authorities and officers thereof having jurisdiction and the work of the construction of such new building shall be carried out in conformity with all laws, rules, regulations and ordinances affecting the same.

3. The lessee agrees to indemnify, hold harmless, and [fol. 18] protect the lessors from and against all claims, demands, fines, liens, suits, judgments, loss and damage of any kind and every nature, directly or indirectly arising from or growing out of the work of the construction of such new buildings, and the lessee further covenants and agrees that no mechanic's liens shall be caused or allowed to be filed against the demised premises and that in the event that any such mechanic's liens be filed against the said premises, the lessee shall cause the same to be discharged

by payment or by bonding or otherwise, within thirty (30) days after the filing of any such lien.

The lessee covenants and agrees that the demised premises shall not be let in whole or in part for the purpose of conducting thereon any theatre, motion picture theatre or bar room.

Attached to and Forming Part of Lease Made by Samuel A. B. Brown and Almira B. Millard to the United Cigar Stores Company of America, Dated June 14th, 1920

Rider hereto attached is hereby made a part hereof.

And the said Lessor doth covenant that the said Lessee on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed that the covenants and agreements contained in the foregoing lease are binding upon the parties hereto and their respective heirs, administrators, successors, legal representatives and assigns.

[fol. 19] In Witness Whereof, the parties hereto have hereunto set their hands and affixed their respective seals the day and year first above written.

Samuel A. R. Brown, Almira B. Millard. In the Presence of: A. C. Manning, Alfred Millard. United Cigar Stores Company of America, by Wm. Baeder, Vice-President. Harry Rubenoff, J. E. Frazer.

(Acknowledged by Samuel A. R. Brown on June 29, 1920; by Almira B. Millard on June 21, 1920; and by Wm. Baeder on July 12, 1920.)

[fol. 20] In United States District Court

Notice of Motion

Sirs: Please take notice that upon the proof of debt filed herein, verified the 10th day of January, 1933, and the annexed petition of Samuel R. Brown and others, claimants herein, verified the 28th day of February, 1933, and all other

pleadings and proceedings had herein, the undersigned will move this Court at a Motion Term thereof to be held on the 13 day of March, 1933, at 11 o'clock in the forenoon of said day, before Honorable Irwin Kurtz, Referee in Bankruptcy, 15 Park Row, Borough of Manhattan, City of New York, N. Y., that the damages claimed in the proof of debt herein be liquidated and that the Court take evidence as to the amount of the claim and that upon the liquidation of said claim accordingly, the claim be allowed in accordance with the measure of loss as determined by the Court, and for such other and further relief as may be meet and just.

Dated February 28, 1933.

Rumsey & Morgan, Attorneys for Claimants. Office and P. O. address: 44 Wall Street, Borough of Manhattan, New York, N. Y.

To Cravath, DeGersdorff, Swaine & Wood, Esqs., Attorneys for Irving Trust Company, Trustee, 15 Broad Street, New York, N. Y.

[fol. 21] IN UNITED STATES DISTRICT COURT

PETITION OF SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD, AND HUGH MILLARD

To the Honorable Irwin Kurtz, Referee in Bankruptcy:

The petition of Samuel R. Brown, Almira R. Millard, Alfred Millard and Hugh Millard, respectfully represents and alleges:

1. Petitioners have heretofore and on or before the 16th day of January, 1933, filed their proof of debt herein against the above named bankrupt. Said proof of debt is hereby referred to, incorporated herein and made a part of this petition.

2. The damages claimed for the loss of rent during the residue of the term ending June 30, 1945, as more fully set forth in said proof of debt, are unliquidated. Your petitioners desire to have said claim liquidated by proof of the actual amount of loss of claimants during the residue of said term.

3. This application is made pursuant to U. S. Code, Title 11, Sec. 103 (b) (Bankruptcy Act, Sec. 63 (b).)

Wherefore, petitioners pray that an order be made herein directing that the damages on said claim be liquidated before the Referee herein, and that the Court take evidence as to said loss, and that upon such liquidation, the claim be [fol. 22] allowed in accordance with the measure of loss as determined by the Court, and for such other relief as may be meet and just.

Dated New York, N. Y., February 28, 1933.

Rumsey & Morgan, Attorneys for Petitioners. Office and P. O. address: 44 Wall Street, New York, N. Y.

(Verified by Charles Dickerman Williams on February 28, 1933.)

[fol. 23] In United States District Court

Order to Show Cause

Upon reading and filing the annexed ex parte petition of Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company of America, the Bankrupt herein, verified March 7, 1933, and sufficient cause appearing therefor, it is, on motion of Cravath, de Gersdorff, Swaine & Wood, attorneys and solicitors for said Trustee,

Ordered that Samuel R. Brown, Almira B. Millard and Hugh Millard (hereinafter called the Claimants) show cause, if any there be, before me at a hearing to be held at 15 Park Row, in the Borough of Manhattan, City of New York, N. Y., on March 13, 1933, at 11:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, why an order should not be entered herein, disallowing and rejecting the claim of the Claimants set forth in the proof of claim filed herein and numbered 1796, expunging said proof of claim and ordering that no dividend be paid thereon.

Further ordered that due and timely service of this order to show cause be made by mailing a copy thereof, together with said petition of the Trustee, on or before March 9, 1933, to the Claimants at the address of the Claimants appearing on said proof of claim.

Dated New York, N. Y., March 8, 1933.

Irwin Kurtz, Referee in Bankruptcy.

[fol. 24] IN UNITED STATES DISTRICT COURT

PETITION OF IRVING TRUST COMPANY

To the Honorable Irwin Kurtz, Referee in Bankruptcy:

The petition of Irving Trust Company, as Trustee in Bankruptcy herein, respectfully shows to the Court as follows:

On September 10, 1932, your petitioner was duly appointed and qualified as Trustee in Bankruptcy of the above named Bankrupt and is acting as said Trustee.

There has been filed with this Court a proof of claim numbered 1796 by Samuel R. Brown, Almira B. Millard and Hugh Millard (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Bankrupt in the sum of $143,615.80. Your petitioner objects to the allowance of said claim for the following reasons:

This claim is based upon a lease covering premises located at the northwest corner of Farnam and 14th Streets, Omaha, Nebraska, and is for damages alleged to arise from loss of rent to accrue on and after September 1, 1932. Since such rent was not due and owing at the date of the filing of the petition in bankruptcy herein, August 29, 1932, your petitioner believes that a claim based thereon does not constitute a debt which may be proved against the bankrupt estate.

Your petitioner, accordingly, desires to have its objections to said claim heard and determined, and said claim re-considered and re-examined in accordance with the ap-
[fol. 25] plicable provisions of the Bankruptcy Act.

Wherefore, your petitioner respectfully requests that an order be entered herein

Ordering that the Claimant appear before this Court at a time and place to be fixed by this Court to show cause, if any there be, why an order should not be made and entered herein disallowing and rejecting said claim, expung-

ing the proof of claim hereinabove referred to, and ordering that no dividend be paid thereon.

Dated March 7, 1933.

Irving Trust Company, as Trustee in Bankruptcy, by Joseph T. Stearns, Assistant Secretary. Cravath, de Gersdorff, Swaine & Wood, Attorneys and Solicitors for Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company of America, No. 15 Broad Street, Borough of Manhattan, New York, N. Y.

(Verified by Joseph T. Stearns on March 7, 1933.)

[fol. 26] IN UNITED STATES DISTRICT COURT

AMENDED PROOF OF DEBT

UNITED STATES OF AMERICA,
State of Nebraska,
District of Nebraska, ss:

At Omaha in the District of Nebraska, on the 13th day of March, 1933, came Winthrop B. Lane of Omaha, in the County of Douglas and State of Nebraska, attorney for Samuel R. Brown of Los Angeles, County of Los Angeles, State of California, Almira B. Millard of Los Angeles, County of Los Angeles, State of California, Alfred Millard of Los Angeles, County of Los Angeles, State of California, and Hugh Millard of the City of Madrid, Republic of Spain, and made oath and says that United Cigar Stores Company of America, a New Jersey Corporation, who is the person by whom a petition for adjudication of bankruptcy has been filed and who has been duly adjudicated a bankrupt, was at and before the filing of said petition, and still is, justly and truly indebted to the said Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, in the sum of $143,615.80. That the consideration of said debt is as follows:

On June 14, 1920, Samuel A. R. Brown and Almira B. Millard were each the owners of a 6/12 interest in the

south ¾ of Lot 8 Block 119 and the east ⅓ of Lot 7, Block 119, being 88 feet on Farnam Street and 99 feet on 14th Street, situated at the northwest corner of Farnam and 14th Streets, and being known as and by the street numbers [fol. 27] 1402-4-6-8 Farnam Street and 218 14th Street in the City of Omaha, County of Douglas, State of Nebraska, together with all buildings and improvements thereon and appurtenances thereto.

On June 14, 1920, Samuel A. R. Brown and Almira Millard, by an indenture of that date, demised said property to the above bankrupt, its successors and assigns, for the term commencing July 1, 1920, and expiring June 30, 1945, at a rent which for the period from July 1, 1924, to June 30, 1945, was to be $20,000 annually, payable in equal monthly payments in advance on the first day of each and every month during the term. Said indenture of lease also provided as follows:

"Provided also, and these presents are upon this covenant, that if the Lessee (meaning the above bankrupt) do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10 days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner [fol. 28] of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

Thereafter Samuel A. R. Brown died and Samuel R. Brown succeeded by operation of law to his 6/12 interest in said property and in said lease.

Thereafter Almira B. Millard conveyed and assigned a 1/12 interest in said property and in said lease each to Alfred Millard and Hugh Millard.

On August 29, 1932, the above bankrupt was adjudicated a bankrupt by the United States District Court for the Southern District of New York.

On September 10, 1932, Irving Trust Company, a corporation organized and existing under the laws of the State of New York, was duly elected Trustee in Bankruptcy of the above bankrupt.

On November 23, 1932, the said Trustee rejected the indenture of lease of said property.

Thereafter and on November 26, 1932, claimants, after due notice to the said Trustee and to the above bankrupt, duly entered upon the said property and the lease thereupon determined.

1. The loss of rent incurred by the tenants by reason of such termination during the residue of the term above specified is $140,615.80. Said loss is computed as follows: [fol. 29] The rent stipulated in the lease was $20,000 per annum after the payment of all taxes and charges. The property has a rental value for the residue of the term of $5,000 annually in addition to taxes and charges. The loss to claimants is therefore $15,000 annually from November 26, 1932, until June 30, 1945. The present value of said sum, discounted at 5% annually, is $140,615.80.

2. The excess of the arrears of rent at the time of said re-entry, viz., $5,000, over and above collections by the claimants from users and occupiers of said premises from September 1, 1932, to November 26, 1932, less expenses and maintenance, taxes, and other charges, viz.: $595.60 is $4,404.40.

3. The total debt is thus $145,020.20, but claim is filed for $143,615.80, so as not to exceed original proof.

That no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that this deponent has not nor has any person by his order or to this deponent's knowledge or belief, for claimants' use, had or received any manner of security for said debt whatever, and this deponent further says that this deposition cannot

be made by the claimants in person because the claimants are located in distant cities and are unfamiliar with the facts except as informed by deponent, and that he is duly authorized by his principals to make this affidavit and that it is within his knowledge that the aforesaid debt was in-
[fol. 30] curred as and for the consideration above stated, and that such debt to the best of his knowledge and belief still remains unpaid and unsatisfied.

Winthrop B. Lane.

Subscribed and sworn to before me this 13th day of March, 1933. Paul L. Martin, Notary Public. (Notarial Seal.)

County Clerk's Certificate attached. (Seal of County Clerk.)

[fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CLAIMS

It is hereby stipulated and agreed by and between the undersigned that the petition of Irving Trust Company, as Trustee in Bankruptcy herein, verified March 4, 1933, to expunge the claim of Samuel R. Brown, Almira B. Millard and Hugh Millard (hereinafter referred to as the Claimants), which is set forth in the proof of claim numbered 1796 and filed herein by said Claimants through their attorney, Winthrop B. Lane, on January 13, 1933, and the petition of said Claimants, verified February 28, 1933, to liquidate said claims, shall also apply to the amended proof of claim filed with the Referee herein by said Claimants on April 5, 1933, and that the determination of the Referee, or of any other court on appeal from or review of the decision of the Referee with respect to said claim, shall apply with like force and effect to the amended proof of claim.

Dated April 7, 1933.

Cravath, de Gersdorff, Swaine & Wood, Attorneys for Irving Trust Company, Trustee in Bankruptcy of United Cigar Stores Company of America. Winthrop B. Lane, Rumsey & Morgan, Attorneys for Samuel R. Brown, Almira B. Millard and Hugh Millard, the Claimants hereinabove referred to.

So ordered.

Irwin Kurtz, Referee in Bankruptcy.

Dated April 8, 1933.

[fol. 32] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

DECISION

Two applications are presented for determination, one by the Irving Trust Company, as Trustee in Bankruptcy herein for an order to disallow and expunge the proof of claim herein, filed by Samuel R. Brown and others (hereinafter called Claimants) for the sum of $145,020.20 as their alleged loss of rentals under an agreement of lease made with the Bankrupt, dated June 14th, 1920, covering certain premises in Omaha, Nebraska; the other by the Claimants for leave to liquidate this alleged loss of rentals in the said sum, as aforesaid.

The lease herein was for the period from July 1st, 1920, to June 30th, 1945; the rent reserved after 1924 was the sum of $20,000 a year net after the payment of taxes, insurance and other incidental charges, and the said rental was to be paid in advance in equal monthly instalments. After making this lease the Bankrupt entered into possession, occupied the same, thereafter on August 29th, 1932, was adjudicated a Bankrupt, and on the same day the Irving Trust Company was appointed Receiver. After the election of the Irving Trust Company, as Trustee, on September 10th, 1932, pursuant to an order of this Court granted on September 29th, 1932, the Trustee herein, on November 23rd, 1932, duly rejected the lease.

The lease contained a covenant, as follows:

"Provided, also, that these payments are upon this covenant * * * if the Lessee shall be adjudicated [fol. 33] bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify

the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

Pursuant to this covenant, by reason of the bankruptcy of the Lessee, the Claimants as Lessors, on November 26th, 1932, duly re-entered and re-possessed themselves of the premises and terminated the lease.

The Claimants contend that the rental value of the premises until the expiration of the term, that is, June 30th, 1945, is only $5,000 a year net; that therefore, the present rental value of the premises is the difference between that amount for such period and the $20,000 a year net reserved by the lease. This results in the amount of the alleged loss, namely, $145,020.20, which also includes the loss suffered between September 1st, 1932, and November 26th, 1932, the date of the termination of said lease. The Claimants' application for leave to liquidate their [fol. 34] claim is based upon this method of computation. The Trustee, however, concedes neither the correctness of this method nor the said estimation of the rental value as being $5,000 per year for the balance of the period.

From the foregoing facts, it is clear that at the time of the adjudication herein, on August 29th, 1932, there was no termination of the lease. The bankruptcy in by itself did not bring about that result. The termination of the lease was within the control of the Claimants and they did not exercise this right until about three months after the bankruptcy, to wit: on November 26th, 1932. Undoubtedly, the Claimants recognized at the time of the adjudication herein on August 29th, 1932, the uncertainty as to the lease being carried as an asset of the estate, and accordingly whether it would be continued in force by the Trustee. Moreover, on that day, irrespective as to whether the Trustee would thereafter reject the lease and whether the Claimants would terminate the lease, it was indeed uncertain whether the Claimants would suffer any loss of rent during the residue of the term in accordance with the language of the covenant and the contract of the parties.

The Claimants stress in their brief that their proof of claim herein is not based upon an anticipatory breach of agreement to pay rent. On the contrary, they maintain that their claim is based upon the ground that the lease herein by specific agreement provided for indemnity

against loss in the event of the termination of the lease by reason of bankruptcy; that this event has taken place, to wit: termination; that therefore, the indemnity clause has been brought into play, and that accordingly the damages as a matter of law suffered by the "Landlord" (Claimants) is the difference between the rent reserved in the lease and the present rental value.

[fol. 35] In support of their position Claimants rely on the case of Maynard v. Elliott, 283 U. S. 273, as authority that the claim herein is provable in bankruptcy, and they rely upon William Filene Sons Co. v. Weed, 245 U. S. 597, as authority for establishing the propriety of their proposed method of computation of the loss of rentals, as aforesaid.

However, neither of these cases establish the propositions urged by the Claimants. In Filene Sons v. Weed, 245 U. S. 597, the covenant provided that the lessee agreed to pay to the lessor as damages (upon the termination of the lease by the lessor after default by the lessee) not the loss of rent which might be suffered during the residue of the term, but an amount equal to the difference between the then rental value and the rent and other payments named in the lease for the residue of the term.

The liability of the lessee (Bankrupt) can rest only upon the agreement contained in the lease, for no rent accrues after the lease is terminated. In the absence of an express covenant, the termination of the lease ends all liability of a tenant thereunder. Moreover, there can be no breach of a contract on the part of the lessee until the time for the payment arrives. The covenant in the instant case merely provided that the Claimants would be entitled to the loss of rent incurred by them during the residue of the term. That loss is neither presently ascertainable nor presently due and obviously will not become so due until the expiration of the term.

The Claimants, method of computation on a covenant similar to the case at bar was presented for determination in Western Electric Co., Inc. v. Powers Accounting Machine [fol. 36] (D. C., S. D. N. Y.) April 14th, 1932, unreported. This case involved an equity receivership proceeding. It appeared therein that after the Equity Receiver had dis-

affirmed the lease, the lessor re-entered and re-let the premises and filed a claim for the difference between the rent reserved in the lease and the rent received in their re-letting. The covenant of the lease provided that in the event of such re-entry by the lessor and the termination of the lease, the lessee should be liable for any loss or deficiency of rent "which might be suffered by the lessor during the remainder of the term above specified." Judge Mack in granting the application to reject the landlord's claim on the ground that it was uncertain, stated:

"But, if as in the present case, on such a termination a lessee becomes liable not for an amount then ascertainable but for the entire loss that the lessor may actually suffer during the remainder of the original term, inasmuch as it is clearly impossible to ascertain that loss until the original term shall have expired—in this case about nine years—the claim must be rejected as uncertain.

In Re Roth & Appel, supra.
Penn. Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721, 759.

"Nor can the Court adopt some other readily ascertainable measure of damages such as the one that would have prevailed but for express specification of the method of determining the damages. The Court cannot alter the contractual provisions; the parties have not agreed that the lessee shall be liable for damages and then merely suggested a method of fixing them; they provided that on such [fol. 37] termination, when but for the provisions no damages could be claimed, the lessee 'shall be liable for any loss or deficiency of rent which may be suffered.'

"Not only is there therefore no basis for the claim as filed for the full reserved rent, but even if it were amended so as to charge an actual termination of the lease and in respect to damages therefor to assert, contrary to the contractual provisions a right to the difference between the rents reserved and the actual rental value at the time of termination, it would have to be disallowed."

Moreover, the Filene Sons case was distinguished by Judge Knox in Schulte United case, Southern District of New York, Bankruptcy, #50355, May 21st, 1932, as follows:

"Nor does the decision in Wm. Filene's Sons Company v. Weed, 245 U. S. 597, compel a different conclusion. That

was not a bankruptcy case and no question of the provability of a claim arising from breach of a lease under the Bankruptcy Act, was there involved."

The Claimants concede that the identical question herein was presented in the leading case of Roth & Appel, 181 Fed. 667. They, however, urge that this case is no longer the law of this Circuit in that it has been overruled by subsequent decisions and particularly by the case of Maynard v. Elliott, supra.

The doctrine of this case has always been authority in this Circuit. It has not been affected by Maynard v. Elliott, which was never intended to cover the situation presented [fol. 38] upon the facts herein, namely, a claim contingent both as to existence and amount and incapable of ascertaining the loss suffered by the Claimants for the residue of the term (June 30th, 1945).

In Roth & Appel, 181 Fed. 667, the Court stated:

"* * * The question in this case—at least with respect to a large part of the claim—is not, in its essence, whether rent to accrue in the future is provable against a bankrupt estate, but whether a claim founded upon an agreement to indemnify a landlord for loss of rents following bankruptcy is provable. * * *"

"* * * But the covenant of indemnity in the present lease was of a very different nature. It called for the payment of no fixed and certain sum. Its purpose was merely to guarantee against possible loss.

"The inquiry, then, is as to the status of the lessor's demand upon this indemnity covenant at the time when the petition in bankruptcy was filed; for it is held that this is the time when the provability of claims against the estate of a bankruptcy is fixed. * * *

"Now, when the petition was filed, the first step toward declaring the lessee bankrupt was taken. It was not certain that bankruptcy would follow; but, if it did follow, the lessor would have the right to re-enter and terminate the lease. Notwithstanding the provision that the lease should terminate in case the lessees should be declared bankrupt, and the lessor should have the right to re-enter, the lease was undoubtedly terminable by the re-entry, and not by the bankruptcy. In re Ells (D. C. 98 Fed. 967). But the lessor was not obligated to re-enter and whether he would do so or not was manifestly dependent upon uncertainties. In-

[fol. 39] deed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature.

"(1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.

"(2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant.

* * * * * * *

"For these reasons, we think that the claim of the appellant, whether regarded as one for unaccrued rents or for indemnity for loss of rent, was not provable against the bankrupt estate under either section 63a (1) or 63a (4), and was properly expunged by the district Court."

The doctrine of Roth & Appel has just been reaffirmed in this District and in this Circuit, in the matter of In re Wise Shoe Inc., 22 A. B. R., 125 (affirmed Second Circuit, April 4th, 1933), viz:

In that case the claim filed by the landlord was based upon a covenant that in the event of default under the lease by the tenant, that the landlord had the right to terminate the lease, re-enter and re-let the premises for the tenant's account and hold the tenant for the difference between the fixed rent for the residue of the original term and the rental realized for re-letting to other parties. Pursuant to this provision the landlord had re-entered the premises prior to the bankruptcy of the tenant.

[fol. 40] Judge Patterson of the District Court in determining that the Landlord's claim was not provable, stated at page 126:

"The provability in bankruptcy of landlords' claims growing out of leases of real estate depends upon the status at the time of bankruptcy. The general rule is that a claim for future rent is not provable. The obligation on the rent covenant is 'altogether contingent.' In re Roth & Appel (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed, 667; Watson v. Merrill (C. C. A., 8th Cir.) 14 Am. B. R. 453, 136 F. 359.

Where the lease imposes upon the tenant the duty of making good to the landlord, any loss in rents due to the tenant's default and subsequent reletting by the landlord, a claim for such loss is not provable in cases where the lease was still a subsisting one at the time of the tenant's bankruptcy. In re Roth & Appel, supra; in re Ells (D. C., Mass.) 3 Am. B. R. 564, 98 F. 967; McDonnell v. Woods (C. C. A., 1st Cir.) 4 Am. B. R. (N. S.) 513, 298 F. 434. Such a claim is said to be too uncertain at the time of bankruptcy in two respects, first as to whether the landlord will re-enter and thus terminate the lease, and second, as to whether any loss in rents will actually come about. The second uncertainty or contingency is found also in cases like the present one, where the landlord had declared the lease terminated prior to bankruptcy but had not then relet the premises. It cannot be predicted at the time of bankruptcy whether there will be any loss. Hence it is held that in such a case a claim based upon the tenant's agreement to indemnify is not provable. (In re Service Appliance [fol. 41] Co., (D. C., N. Y.) 15 Am. B. R. (N. S.) 478, 39 F. (2d) 632; In re Goldberg (D. C., N. Y.), 18 Am. B. R. (N. S.) 332, 52 F. (2d) 156; In re Hubbard (D. C., N. Y.), 20 Am. B. R. (N. S.) 612, 57 F. (2d) 213."

In view of all the foregoing, the Trustee's application is granted, and the proof of claim herein is disallowed and expunged. The Claimants' application for leave to liquidate is accordingly denied.

Submit order on two days' notice.

Dated New York, April 24th, 1933.

Irwin Kurtz, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

ORDER EXPUNGING CLAIM

Upon reading and filing the amended proof of claim filed April 7, 1933, the petition of Irving Trust Company, Trustee in Bankruptcy, herein, verified the 7th day of March, 1933, the order to show cause filed herein the 13th day of March, 1933, the affidavit of John T. Nolan, verified March 8, 1933, as to the mailing of said petition and order to show cause to Samuel R. Brown, Almira B. Millard and Hugh Millard, the Claimants referred to in said petition, from

which it appears that said petition and order were duly [fol. 42] served by mail as therein provided, the petition of said Claimants, verified the 28th day of February, 1933, and the notice of motion, dated February 28, 1933, and the matter having duly come on to be heard before this Court on the 13th day of March, 1933, in pursuance of the provisions of said order to show cause and said notice of motion, and after hearing Messrs. Rumsey & Morgan, the attorneys for said Claimants, by C. D. Williams, Esq., of counsel, in opposition to the petition of said Trustee and in support of the petition of said Trustee and in support of the petition of said Claimants, and Messrs. Cravath, de Gersdorff, Swaine & Wood, the attorneys for said Trustee, in support of the petition of said Trustee and in opposition to the petition of said Claimants, and upon due consideration,

It is, on motion of Cravath, de Gersdorff, Swaine & Wood, attorneys for said Trustee,

Ordered that the petition of said Trustee, verified March 7, 1933, be and it hereby is, in all respects granted, that the claim set forth in the proof of claim numbered 1796 filed herein on January 13, 1933, by Samuel R. Brown, Almira B. Millard and Hugh Millard, the Claimants above referred to, be, and it hereby is, disallowed and rejected, that said proof of claim be, and it hereby is, expunged and that no dividend be paid thereon, and it is

Further ordered that the relief prayed for in the petition of said Claimants be, and it hereby is, in all respects denied and said petition dismissed.

Dated New York, N. Y., April 26, 1933.

Irwin Kurtz, Referee in Bankruptcy.

[fol. 43] IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW

To the Honorable Irwin Kurtz, Esq., Referee in Bankruptcy:

The petition of Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard respectfully represents and alleges.

I. Petitioners are creditors of United Cigar Stores Company of America, the above named bankrupt, and their claim in the sum of $143,615.80 was heretofore filed herein. The damages claimed therein being unliquidated, petitioners thereafter filed their petition herein to liquidate the same. Thereafter objections were filed by the Trustee and the same were duly heard by the referee herein. The referee held petitioners' claim unprovable.

II. On the 26th day of April, 1933, an order, a copy of which is hereto annexed, was made and entered herein by which petitioners' petition was denied and their claim disallowed, rejected and expunged, and it was ordered that no dividend be paid thereon.

III. Such order was and is erroneous in that the referee erred in holding that the claim alleged in such proof does not constitute a debt which may be proved against the bankrupt estate.

Wherefore, your petitioners, feeling aggrieved because of such order, pray that the same may be reviewed as pro-
[fol. 44] vided in the Bankruptcy Act and in General Order XXVII.

Dated New York, N. Y., April 26, 1933.

Rumsey & Morgan, Attorneys for Petitioners. Office and P. O. Address: 44 Wall Street, Borough of Manhattan, City of New York.

(Verified by Charles Dickerman Williams on March 26, 1933.)

[Here follows order of referee printed supra at folios 123-126.]

[fol. 45] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF REFEREE

To the Honorable Judges of the United States District Court, Southern District of New York:

I, Irwin Kurtz, Referee in Bankruptcy herein, do hereby certify:

1. On April 26th, 1933, an order was made which granted the application of the Irving Trust Company as Trustee, to disallow and expunge the proof of claim of the Petition-

ers' herein, and at the same time denied the Petitioners' application for leave to liquidate the same. This order was based upon the ground that the said claim was not provable in bankruptcy as it was for unliquidated damages upon an indemnity for loss of future rentals, by reason of the termination of the lease herein by the petitioners—(Land lords) which occurred after the adjudication herein.

2. On April 29th, 1933, the Petitioners feeling aggrieved thereat filed a petition for review.

3. The error complained of is that the proof of claim herein constitutes a debt provable in bankruptcy.

4. A summary of the proceedings herein, the contentions of both the Petitioners and the Trustee, and the conclusions of the Referee are fully set forth in the Decision dated April 24th, 1933, to which the Court is respectfully referred as to the legal question presented.

[fol. 46] 5. I hand up herewith the following:

(a) Petition for Review.

(b) Referee's decision dated April 24th, 1933.

(c) Order sought to be reviewed.

(d) Application of Trustee and Petitioners, and original and amended proof of claim.

Dated New York, May 1st, 1933.

Irwin Kurtz, Referee in Bankruptcy.

This Certificate will be on the Bankruptcy Motion Calendar for hearing in the District Court, on Wednesday, May 3rd, 1933, at 10.30 A. M.

Notice thereof by mail has been given to Rumsey & Morgan, Esqs., Attorneys for Petitioners, 44 Wall Street, New York City; Messrs. Cravath, de Gersdorff, Swaine & Wood, Attorneys for Irving Trust Company, Trustee, 15 Broad Street, New York City.

[fol. 47] IN UNITED STATES DISTRICT COURT,
SOUTHERN NEW YORK

Present: Hon. Frank J. Coleman, District Judge.

In Bankruptcy. No. 55129

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, a New Jersey Corporation, Bankrupt

Re Claim of Samuel R. Brown et al.

ORDER APPEALED FROM—May 3, 1933

Petitioners Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, having heretofore, on April 29, 1933, filed their petition for review of the order of Hon. Irwin Kurtz, Referee in Bankruptcy, of April 26, 1933, granting the application of the Irving Trust Company, as Trustee, to disallow and expunge the proof of claim of the petitioners herein, and denying the petitioners' application for leave to liquidate the same, and said petition for review having come on for hearing before the Court, and the Court being duly advised in the premises,

It is ordered, adjudged and decreed by the Court that the Referee's said order be and is hereby affirmed and that the petition for review be and is hereby denied and dismissed.

To all of which petitioners except.

Frank J. Coleman, U. S. D. J.

[fol. 48] MEMORANDUM ENDORSED ON ORDER APPEALED FROM

This order is signed without argument because the question involved has already been passed upon by five other Judges of this Court and I, therefore, deem is not open so far as the District Court is concerned.

5/3/33.

Frank J. Coleman, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Now come the above named petitioners, Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, and feeling themselves aggrieved by the final order, judgment and decree of this Court entered on May 3, 1933, [fol. 49] in the above entitled proceeding, affirming the order of the Referee made and entered herein on April 26, 1933, which order of the Referee denied the petitioners' petition to liquidate their claim herein and disallowed, rejected and expunged the same and ordered that no dividend be paid thereon, and denying and dismissing said petitioners' petition for review of said order of the Referee, hereby petition for an appeal from the said order, judgment and decree to the United States Circuit Court of Appeals for the Second Circuit, and pray that their appeal may be allowed and a citation granted, directed to Irving Trust Company, Trustee of the above entitled bankrupt estate, commanding said Trustee to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceeding and paper upon which said order, judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., May 4, 1933.

Rumsey & Morgan, Attorneys for Petitioners-Appellants. Office and Post Office address: 44 Wall Street, Borough of Manhattan, City of New York.

[fol. 50] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Petition approved and appeal allowed as prayed for; bond on appeal dispensed with on stipulation of counsel.

May 5, 1933.

Frank J. Coleman, U. S. D. J.

In United States District Court

Assignment of Errors

Now come the above named petitioners Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard and file the following assignment of errors and say that the final order, judgment and decree of the United States District Court for the Southern District of New York, entered herein on May 3, 1933, is erroneous for the following reasons:

1. The Court erred in affirming the order of the Referee made and entered April 26, 1933, which order of the Referee denied petitioners' petition to liquidate their claim herein and disallowed, rejected and expunged the same and ordered that no dividend be paid thereon.
2. The Court erred in denying and dismissing petitioners' petition for review of the said order of the Referee.
3. The Court erred in disallowing, rejecting and expunging petitioners' claim herein and in ordering that no dividend be paid thereon.

[fol. 51] 4. The Court erred in denying petitioners' petition to liquidate their claim.

5. The Court erred in holding that the claim alleged in petitioners' proof does not constitute a debt which may be proved against the bankrupt estate.

Wherefore, petitioners pray that said order, judgment and decree may be reversed and that their claim be allowed as prayed for.

Dated New York, N. Y., May 4, 1933.

Rumsey & Morgan, Attorneys for Petitioners-Appellants. Office & Post Office address: 44 Wall Street, Borough of Manhattan, City of New York.

[fol. 52] Stipulation Waiving Bond

Stipulation of counsel waiving bond on appeal omitted in printing.

Citation

Citation in usual form; omitted in printing.

In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record in said District Court, in the above entitled matter as agreed on by the above named petitioners-appellants and Irving Trust Company, Trustee in Bankruptcy.

Dated May 8th, 1933.

Rumsey & Morgan, Attorneys for Petitioners-Appellants. Cravath, de Gersdorff, Swaine & Wood, Attorneys for Irving Trust Company, Trustee in Bankruptcy.

[fol. 53] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 466

Argued June 9, 1933. Decided July 17, 1933

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD, and HUGH MILLARD, Appellants,

v.

IRVING TRUST COMPANY, Trustee, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeal from an order in bankruptcy of the District Court for the Southern District of New York expunging a claim against a trustee.

Charles Dickerman Williams, of New York City, for appellants.

Donald C. Swatland, Wm. D. Whitney, and R. L. Gilpatric, all of New York City, for appellee.

A. M. Hollister, amicus curiæ.

L. HAND, Circuit Judge:

This case is governed by the case of Manhattan Properties, Inc., v. Irving Trust Co., Trustee, — F. (2d) —, handed down herewith, if the covenant in the lease is in substance the same. For this reason we confine ourselves to its consideration. The lease gave the lessor a right of re-entry upon breach of any of the covenants contained, or in case the term was seized on execution, or that the lessee was adjudicated, or had assigned for the benefit of creditors. The lessee's covenant in case of re-entry for any reason was that "it will indemnify the lessor against all loss of rent which the lessor may incur by reason of such termination, during the residue of the term." We cannot construe this language as meaning that the lessee will pay the difference

between the aggregate of the accelerated rents, discounted, and the present value of the term, assuming that that would make the claim provable, which we do not say. The lessor might well not have been content with any such relief; rents might fall after the reentry and leave him uncovered pro tanto. True, he might have reserved such an option, if there was also a provision for liquidated damages, besides the language we have quoted. But he cannot make the clause serve both purposes; one, give him an immediate claim for liquidated damages; the other, a series of claims for the difference between each installment and what he could get on a release, or perhaps only a general claim for indemnity at the end of the term. The New York Court of Appeals suspended for so long a clause, even like that in Manhattan Properties, Inc., v. Irving Trust Co.; Hermitage Co. v. Levine, 248 N. Y. 333, 162 N. E. 97, 59 A. L. R. 1015. There is more reason to do so here. But it is not necessary for us to decide whether the clause was so suspended, or whether the lessee should pay the difference each month; in either case there can be no proof.

The claimant next argues that in case of bankruptcy it could not have been the purpose to reserve a claim or a series of claims in the future against a bankrupt corporation, and that for this reason the promise should be construed as one for liquidated damages. If the only condition of re-entry had been bankruptcy, more could be said for this, though hardly enough in view of the terms chosen; but under this lease the lessor might re-enter for any breach of covenant, and some of these might occur while the lessee was amply able to respond. If in those events the promise was to indemnify the lessee seriatim, or at the end of the term, we cannot recast the words to make them over into a liquidation of damages in the case of bankruptcy. Possibly the full intent was not expressed; if so, the loss must fall upon the lessor, who presumably drafted it.

Finally, the question arises as to so much of the claim as accrued before the expiration of the time to file claims, which could of course have been pro tanto liquidated in season, like a claim against an indorser of a note which became due before that time. This part of the claim seems to me to present acutely the issue in general, and of course as I should include damages for all installments, a fortiori I should include these. But taken strictly, the doctrine of

In re Roth & Appel (C. C. A.) 181 F. 667, 31 L. R. A. (N. S.) 270, does not admit of that variant. A claim for future rent must be fixed at petition filed and not become absolute thereafter; the distinction attaches not only to realty itself, but to covenants which concern it or rents issuing from it. We all agree that the claim was either good or bad as a whole, though we recognize that there are stronger reasons for holding good that part which fell due before the expiry of the period to file claims, or to distribute the estate.

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and thirty-three.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of UNITED CIGAR STORES COMPANY, Bankrupt;
SAMUEL R. BROWN et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree. Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 57, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of In the Matter of United Cigar Stores Company, Bankrupt; Samuel R. Brown et al., Appellants, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of September, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,109. U. S. Circuit Court of Appeals, Second Circuit. Term No. 506. Samuel R. Brown, Almira B. Millard, Alfred Millard, and Hugh Millard, petitioners, vs. Irving Trust Company, as trustee in bankruptcy of United Cigar Stores Company. Petition for a writ of certiorari and exhibit thereto. Filed October 5, 1933. No. 506, O. T., 1933.

(4256)